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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT CLAY WOODS,

Defendant and Appellant.

B289477

(Los Angeles County
Super. Ct. No. BA454486)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Judgment affirmed, modified, sentence partially vacated, and remanded.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Robert Clay Woods of attempted murder (Pen. Code, §§ 664/187; count 1)¹ with true findings that he intentionally discharged a handgun causing great bodily injury (§§ 12022.53, subds. (c) & (d)) and personally inflicted great bodily injury (§12022.7, subd. (a)).² He was also convicted of misdemeanor vandalism. (§ 594, subd. (a); count 2). The court sentenced appellant to the middle term of seven years on count 1, plus a consecutive term of 25 years to life on the section 12022.53, subdivision (d) enhancement, and an additional three years for the section 12022.7 enhancement.³ The court purported to impose a concurrent term of two years on the misdemeanor vandalism count.

On appeal, appellant contends that: (1) the court abused its discretion in not striking the section 12022.53, subdivision (d) enhancement; (2) the three-year term for the section 12022.7 must be stayed; and (3) the two-year term for misdemeanor vandalism must be vacated and the case remanded for resentencing on that count.

We disagree with the first contention, but agree with the latter two: the three-year term imposed for the great bodily injury enhancement under section 12022.7, subdivision (a) must be stayed because the court also imposed a 25-years-to-life sentence for personal

¹ Unspecified statutory references will be to the Penal Code.

² The jury found not true that the attempted murder was willful, deliberate, and premeditated.

³ The court imposed and stayed under section 654 a 20-year sentence on the section 12022.53, subdivision (c) enhancement.

and intentional discharge of a firearm causing great bodily injury under section 12022.53, subdivision (d), and the two-year term on the misdemeanor vandalism count, which is punishable only by a term of imprisonment in a county jail not exceeding one year, must be vacated. We therefore order the judgment modified to reflect that the section 12022.7 sentence is stayed, vacate the sentence imposed on the misdemeanor vandalism count, and remand for the court to resentence on that count. In all other respects the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On February 9, 2017, appellant shot Starr Jones, the current boyfriend of Minella Murphy (Minella). Appellant was Minella's former boyfriend (they broke up in November 2016) and the father of her children. Jones did not testify at trial, and the prosecution case consisted in large part of the testimony and prior inconsistent statements of Minella and Rollmilow Murphy (Minella's half-brother), as well as testimony by Minella Pinkney (Minella and Rollmilow's mother).

On the date of the crime, Minella and Jones were living with Pinkney at Pinkney's house, along with various family members, including Rollmilow. At trial, Rollmilow testified that around 8:50 a.m. that day, he was outside taking out the trash when he heard glass breaking. Then a van drove up and he heard gunshots. The van drove off, and hit a car in the street as it did so. At the front of the house, Rollmilow observed Jones lying on the ground.

Rollmilow was impeached by statements he gave to Los Angeles Police Officer Christopher Shen (he responded to the scene following a 911 call by Pickney). According to Officer Shen, Rollmilow told him that he saw appellant smashing the windshield of Minella's car with a pink scooter. Rollmilow went inside to get Minella, but returned with Jones instead. Appellant was sitting in the driver's seat of a van. Rollmilow walked to the van to talk to appellant, but appellant produced a semiautomatic pistol from his waistband, pointed it at Jones, and fired four or five times. Appellant then pulled forward, struck a parked car, and drove off. Officer Shen found a .380 shell casing on the street in front of the house and a bullet fragment in the garage.

Pinkney testified that she was in her bedroom watching television when she heard gunshots. She went outside and observed appellant driving away in a minivan. As he left, he hit the curb at the street corner. When she reentered the house, she observed Jones bleeding and hopping in pain. He had been shot in the buttocks, with an exit wound in his thigh. The boyfriend of one of Pinkney's daughters drove Jones to the hospital, and Pinkney called 911.

At trial, Minella's testimony was evasive. She testified that on the day of the shooting, Jones "came out of nowhere to say that he was shot." She admitted that the windshield of her car was broken, but claimed it was caused by her hood being opened and striking the windshield. She was impeached by statements she made to Los Angeles Police Officer Phil Rodriguez, who interviewed her at the hospital where Jones was being treated. Minella told Rodriguez that she was at

her house the prior night with Jones. Appellant called her several times while she was taking a shower. Jones answered one of the calls, told Minella that appellant had called, and questioned her about why he was calling. Minella noticed a number of incoming calls from an unknown number. She called the number and appellant answered, so she hung up.

Minella further told Rodriguez that, around 9:00 a.m. the next morning, she was in her house when Rollmilow ran in and said someone was vandalizing her car. Jones confronted appellant outside. After a brief argument, appellant walked to the van, got a handgun, and started shooting at Jones.

The van used by appellant belonged to Alejandro De La Luz, who owned a party supply store in Los Angeles. Appellant worked across the street and occasionally borrowed Luz's van. Appellant borrowed the van on February 9 around 8:30 a.m. Appellant's mother returned the van keys later that day and told Luz she had parked the van up the street. When it was returned, the front passenger window was shattered, consistent with being struck by gunfire shot from inside the van.

After the shooting, Investigator Justin Benson met with Jones at the courthouse. Jones showed Benson a bump on his buttocks. Benson noted that Jones appeared to have difficulty lifting his right leg and appeared to be in pain. He had an "exaggerated limp" and held his back when he walked.

Defense Evidence

Appellant testified on his own behalf and denied shooting Jones. About 14 months before the incident, appellant ended his relationship with Minella because Minella was not honest, “liked to play games,” and appellant felt that he was being used by her family, who kept asking him for money. Minella became angry and sometimes did not allow appellant to see his children.

In late January or early February of 2017, Minella brought the children to stay with appellant for a week. Minella asked appellant for money for food, which he gave her. She also asked appellant for money to fix her windshield, which she said cracked when the hood flew up. He did not believe it was cracked by the hood, but he gave her the money.

In February 2017 Rollmilow called appellant and asked for money, but appellant refused. Rollmilow “cussed [appellant] out,” and appellant hung up the phone.

Appellant did not recall if he borrowed Luz’s van on February 9.

DISCUSSION

I. Section 12022.53 Enhancement

Appellant contends the trial court abused its discretion in denying his motion to strike the section 12022.53, subdivision (d) enhancement. He argues that, although the jury found the enhancement to be true, the evidence supporting the finding that he shot Jones was “not overwhelming.” Therefore, the court should have stricken the enhancement. We disagree.

Senate Bill No. 620, effective January 1, 2018, amended section 12022.53, subdivision (h) to give the trial court discretion to strike a section 12022.53 enhancement: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§ 12022.53, subd. (h).) By the time of appellant’s sentencing, the legislation had taken effect, and appellant requested the trial court to strike the section 12022.53, subdivision (d) enhancement.

In denying the motion to strike, the court stated: “So the reason is that although the court realizes it has the discretion to strike the firearm allegation, I don’t see why I should in this case. He used a gun. The gun was used to inflict great bodily injury. [¶] . . . [T]he great bodily injury allegation was found to be true, and there’s no real reason to strike that.”

The trial court’s sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Whether described as overwhelming or not, the evidence that appellant shot Jones and inflicted great bodily was certainly substantial. The trial court’s brief reasoning—there was no reason to strike the enhancement because appellant used a gun and inflicted great bodily injury, as found by the jury—simply acknowledged that fact, and was clearly not an abuse of discretion.

II. *Stay of Section 12022.7 Enhancement*

Appellant contends, and respondent concedes, that the trial court erred in imposing both an enhancement for firearm use causing great bodily injury under section 12022.53, subdivision (d) and a consecutive three-year enhancement for great bodily injury under section 12022.7, subdivision (a).

Section 12022.53 provides that “[a]n enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).” (§ 12022.53, subd. (f).) “Because the court also imposed the 25-year-to-life enhancement under section 12022.53, subdivision (d), for intentionally discharging a firearm with great bodily injury, the court should have stayed the three-year enhancement for great bodily injury under section 12022.7.” (*People v. Garcia* (2017) 7 Cal.App.5th 941, 949.) We therefore will order the judgment modified to reflect that the three-year term is stayed.⁴

III. *Misdemeanor Vandalism Sentence*

Appellant contends, and respondent again concedes, that the trial court erred in imposing the mid term of two years for his misdemeanor vandalism conviction. Misdemeanor vandalism “is punishable by

⁴ Appellant’s fourth contention is that the abstract of judgment incorrectly reflected the sentence imposed on his enhancements. He concedes in his reply brief that the abstract of judgment correctly stated that the total term imposed on his enhancements was 28 years, but the abstract of judgment must be amended to reflect that the section 12022.7 sentence is stayed.

imprisonment in a county jail not exceeding one year.” (§ 594, subd. (b)(2)(A).) The two-year term accordingly must be vacated.

DISPOSITION

The judgment is modified to stay execution of the three-year term for the section 12022.7 enhancement. We direct the clerk of the superior court to amend the abstract of judgment to reflect that the sentence for the enhancement is stayed and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. The two-year sentence on count 2 is vacated and the matter remanded for the trial court to resentence appellant for misdemeanor vandalism. In all other respects the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.